

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BAKE SOMEONE HAPPY, INC.	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Corporation Franchise Tax under	:	
Article 9-A of the Tax Law for the Fiscal	:	
Year Ended September 30, 1983.	:	

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Petitioner, Bake Someone Happy, Inc., P.O. Box 32, Canton, New York 13617, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the fiscal year ended September 30, 1983 (File No. 804014).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York on January 11, 1988, with all briefs to be filed by January 22, 1988. Petitioner appeared by Brian W. Staples, C.P.A. The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner's claim of an investment tax credit on costs incurred for the rehabilitation of a building containing a restaurant was properly denied on the basis that the restaurant was not a retail enterprise.

FINDINGS OF FACT

1. During the period in issue, petitioner, Bake Someone Happy, Inc., operated a restaurant under the name of McCarthy's Restaurant in Canton, New York.
2. During the period October 1982 through September 1983 petitioner rehabilitated the premises of the restaurant. The rehabilitation included changes in the windows, heating system and building structure.
3. Petitioner filed a New York State Corporation Franchise Tax Report for the fiscal year ended September 30, 1983 wherein it claimed an investment tax credit for the costs incurred to

rehabilitate its restaurant facility.

4. On October 2, 1986 the Audit Division issued a Notice of Deficiency to petitioner asserting a deficiency of corporation franchise tax for the fiscal year ended September 30, 1983 in the amount of \$1,064.99 plus interest of \$409.98 for a balance due of \$1,474.97. The Statement of Audit Adjustment, which had previously been issued, explained the premise of the asserted deficiency: the investment tax credit on the rehabilitated building was not permitted since a restaurant is not considered to be engaged in the retail sale of tangible personal property as defined by Tax Law § 1101(b)(4)(i).

5. Petitioner was a registered vendor under the sales tax law and sold prepared food to be consumed on the premises. It also sold some food for off-premises consumption.

6. At various times a small office and gift shop have been operated on petitioner's premises. However, at least 75 percent of petitioner's revenue was generated from the operation of the restaurant.

#### SUMMARY OF PETITIONER'S POSITION

7. Petitioner maintains that it was a "retail enterprise" within the meaning of Tax Law § 210.12(k) and that Matter of Burger King v. State Tax Commn. (51 NY2d 614), which was decided December 22, 1980, is not controlling since it was decided before the effective date of Tax Law § 210.12(k) which was May 15, 1981.

#### CONCLUSIONS OF LAW

A. That in 1981 the Legislature enacted Tax Law § 210.12(k) thereby permitting certain retail enterprises to claim an investment tax credit on qualified rehabilitation expenditures (L 1981, ch 103, as amended by L 1981, ch 1043). This section defines a retail enterprise which is eligible to claim an investment tax credit as one which is:

"(i) a registered vendor under article twenty-eight of this chapter, (ii) primarily engaged in the retail sale, as the term 'retail sale' is defined in subparagraph (i) of paragraph four of subdivision (b) of section eleven hundred one of this chapter, of tangible personal property, and (iii) otherwise eligible for the credit allowed pursuant to section thirty-eight of the internal revenue code." (Emphasis supplied.)

B. That Tax Law § 1101(b)(4)(i) defines a retail sale, in part, as "[a] sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property...."

C. That in Matter of Burger King v. State Tax Commn. (supra \_\_\_\_\_), the Court held that restaurant food was a "hybrid" transaction consisting of the delivery of a service and food rather than "tangible personal property" as that term is defined in Tax Law § 1101(b)(4)(i).

Consequently, on the basis of Matter of Burger King v. State Tax Commn. (supra) it must be concluded that petitioner was not a retail enterprise contemplated by Tax Law § 210.12(k). It is noted that petitioner's argument that Matter of Burger King v. State Tax Commn. (supra \_\_\_\_\_) is

not controlling since the Court of Appeals decision predates the effective date of Tax Law § 210.12(k) is without merit. The Court's decision was predicated upon an interpretation of Tax Law § 1101(b)(4)(i) which was in effect before the effective date of Tax Law § 210.12(k).

D. That the petition of Bake Someone Happy, Inc. is denied and the Notice of Deficiency dated October 2, 1986 is sustained.

DATED: Albany, New York  
March 24, 1988

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ADMINISTRATIVE LAW JUDGE